



### ISSUES

The ALJ executed an Order that contains no effective date thereon, but provides for the payment of a medical bill to Dr. Joseph Galichia in the sum of \$5,438.80 for a cardiac catheterization on September 30, 2004. That same Order also finds that claimant complied with the statutory requirements set forth in K.S.A. 44-512a and is entitled to a payment of penalties in the sum of \$543.88 and \$750.00 in attorney's fees. Finally, the Order also appears to provide for the payment of \$28.19 in penalties and *another* \$750 in attorney's fees for respondent's failure to timely pay mileage reimbursement following claimant's statutory request.

Respondent has appealed this Order alleging a variety of errors. They are as follows:

1. Timeliness of the Respondent's Appeal;<sup>3</sup>
2. Whether the medical bill from the Galichia Medical Group in the amount of \$5,438.80 was incurred as a direct and natural consequence of the work related injury?[sic];
3. Whether penalties should be assessed for the unpaid medical bill?[sic]; [and]
4. Whether attorney's fees should be awarded on the Post-Award Hearing?[sic]<sup>4</sup>

Respondent argues that its application for review<sup>5</sup> was timely filed "[b]ecause the Order from the Post-Award hearing was undated"<sup>6</sup> thus it is impossible to determine the effective date of the Order or the date upon which the appeal time begins to run.<sup>7</sup> Respondent then argues that it should not be responsible for the bills incurred for the claimant's heart catheterization as claimant's heart condition pre-existed his work-related injury and therefore is not causally related to his work injury. Finally, respondent argues that the fees claimant's attorney is asking for are excessive with no documentation to justify the high cost.

Claimant has not filed a brief, but would presumably ask for the Order to be affirmed in all respects.

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<sup>3</sup> In the Board's docketing notice, the parties were asked to address the timeliness of respondent's appeal.

<sup>4</sup> Respondent's Brief at 1 (filed Mar. 5, 2007).

<sup>5</sup> Respondent's application for review was filed, via fax, on February 15, 2007.

<sup>6</sup> Respondent's Brief at 3 (filed Mar. 1, 2007).

<sup>7</sup> Unfortunately, the Division's file does not contain a file stamped copy of the Order.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

On September 19, 2003, the ALJ entered an Award granting claimant a permanent total disability as well as the right to future medical treatment upon proper application. Highly summarized, claimant suffered a crush injury to his right foot while working for respondent. The compensability of this injury was never contested. However, the relationship of that injury to his subsequent conditions as well as his pre-existing cardiac history were always in dispute.

While receiving treatment for his right foot, claimant developed a staph infection, respiratory distress syndrome and aspiration pneumonia. His condition continued to deteriorate and doctors suspected a subendocardial infarction which led to a left heart catheterization. That procedure revealed no major changes in claimant's condition from an earlier (pre-injury) procedure. Ultimately, a number of complications developed and claimant had his left and right feet amputated.

In July 2002, at his attorney's request, claimant was evaluated by Dr. Philip Mills, who later testified on claimant's behalf. According to Dr. Mills, claimant's preexisting medical problems, specifically the peripheral vascular disease and diabetes "were permanently aggravated or accelerated by the injury" the claimant sustained on October 10, 2001 and the subsequent treatment.<sup>8</sup>

When the respondent appealed the ALJ's Award to the Board, the parties agreed that claimant had sustained a 42 percent functional impairment and was permanently and totally disabled. However, respondent pursued a legal argument that suggested claimant's permanent and total disability status was nonetheless capped by virtue of the provisions of K.S.A. 44-510f. The Board disagreed and that finding was upheld in an unpublished opinion by the Court of Appeals.<sup>9</sup>

Thereafter, the parties returned to the ALJ and stipulated that claimant was in need of additional treatment for his work-related injury.<sup>10</sup> On November 23, 2005, Dr. Geri Hart

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<sup>8</sup> Mills Depo., Ex. 2 at 6 (July 15, 2002 report).

<sup>9</sup> *McFall v. United Parcel Service*, No. 92,090, unpublished opinion filed Mar. 25, 2005.

<sup>10</sup> Both parties signed this Agreed Order, but this Order likewise does not contain any place for the ALJ to insert a date in order to signify the effective date.

was authorized to provide insulin and supplies, while Dr. J. Galichia was authorized as the treating physician to provide treatment to the claimant for his work-related injury.<sup>11</sup>

On September 30, 2004, *before the date of the parties' Agreed Order*, claimant underwent a cardiac catheterization at the direction of Dr. Galichia. Following that procedure a document was issued that indicates claimant was required to have annual cardiology follow-up visits for purposes of renewing his prescriptions. And that he had such a follow-up in February 2003 which "was not for any injury/illness that is work related."<sup>12</sup>

There is no indication within the file precisely why claimant had this procedure, although it is clear that claimant's injury and subsequent course of treatment has compromised his respiratory and cardiac conditions. Although claimant was able to keep his diabetes in check without medication before his injury, the injury triggered a cascade of health problems which has now necessitated claimant taking a number of medications for a heart arrhythmia and insulin to treat his diabetes.

According to claimant, Dr. Galichia ordered the heart catheterization to ensure a stable flow of blood was reaching his lower extremities. As a result of that procedure, he was billed in excess of \$5,000. When claimant submitted this bill for payment, respondent refused to pay, apparently contending that the test was not related to the work injury. Similarly, requests for mileage and replacement batteries for a motorized scooter went unpaid.

The difficulty in this case comes in the fact that claimant had undergone a number of heart catheterizations before his work-related injury. Thus, respondent maintains it should not absorb the cost for these procedures when claimant required them independent of his accident. And the issue is further complicated by the contents of the record, or better said, the lack thereof, and with the Order itself.

In support of respondent's contention that claimant's heart catheterization is unrelated, two physicians examined claimant and opined that claimant's heart condition is independent of his work-related injury. Dr. Lamont Weide, an endocrinologist, examined claimant in August 2005 and indicated claimant has a history of peripheral vascular disease along with coronary artery disease which will continue to progress regardless of the crush injury.

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<sup>11</sup> P.H. Trans. (Dec. 5, 2006), Cl. Ex. 1 (Agreed Order, undated). Like the Order at issue herein, this Agreed Order is undated and bears only a "received" date stamp of November 23, 2005, and it appears to have been drafted by claimant's counsel. The Division's records show this was filed November 23, 2005.

<sup>12</sup> *Id.*, Resp. Ex.1.

Dr. Lillian R. Harstine examined claimant in November 2005 and opined that claimant's crush injury had resolved itself and that his permanent incapacity is related to his peripheral vascular disease and its complications and co-morbidities.<sup>13</sup>

None of these physicians speak to the issue of medical mileage, or the need for a new battery for a motorized scooter. And there is nothing in the record to explain why those expenses were not paid when faced with a statutory demand. In fact, respondent does not mention that portion of the Order at all. Still further confusing is the fact that claimant requested \$750 in attorneys fees in two separate demand letters, but there is not one scintilla of evidence to substantiate this request other than claimant's counsel's demand and the fact that claimant's attorney appeared at the hearing before the ALJ.

Before any of these issues can be addressed, there is the issue of the timeliness of respondent's appeal that must be considered. On December 5, 2006, the ALJ held a hearing on the claimant's request for penalties based upon two statutory demands, one for the payment of a medical bill and the other for mileage and a battery for a motorized scooter. While an Order was entered, that Order does not contain a date. Respondent represents that the Order was prepared by claimant's counsel<sup>14</sup> and signed by the ALJ. The Order does not bear any date although respondent admits that it was stamped "received" by his office on February 5, 2007. Unfortunately respondent did not attach the envelope in which the Order was mailed in order for the Board to determine when the Order was actually mailed.

Respondent filed its Application for Review on February 15, 2007 via fax and a hard copy was later submitted to the Division and file stamped February 22, 2007. When the appeal was docketed, the parties were asked to address the issue of the timeliness of respondent's appeal. Claimant has offered no explanation for this situation. After due consideration and failing any other explanation, the Board agrees with respondent's contentions that its application for review is timely.

The Workers Compensation Act provides that Awards "shall be effective the day following the date noted in the award."<sup>15</sup> It is obvious that an Order cannot be considered effective unless one can ascertain the date it is signed. And in this instance, the Order at issue bears no date. If, in fact, claimant's counsel prepared this Order, the Board is extremely concerned about the methodology employed as it appears that not only did respondent not approve the Order, but respondent had no knowledge of the contents of the Order until after it was sent to the ALJ, signed by the ALJ, filed and a copy mailed to counsel.

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<sup>13</sup> *Id.*, Resp. Ex. 2 at 5 (Dr. Harstine's Dec. 15, 2005 Report).

<sup>14</sup> Of some concern, respondent's counsel represents that he had to contact the ALJ's office to ascertain when the Order was entered and was informed that the Order was prepared by claimant's counsel.

<sup>15</sup> K.S.A. 44-525.

Setting that aside, the Board finds that due process mandates a finding that respondent's application for review was timely.<sup>16</sup> Respondent filed its application for review within 10 days of receiving the Order from the ALJ. In the absence of proof that the Order was signed, and thus effective, on an earlier date and properly mailed to and received by respondent, the Board must allow this appeal. Given this vague record and unorthodox procedure, the Board has no difficulty finding respondent's application timely.

Turning now to the issue at hand, the Board finds that the claimant failed to meet his burden of proving the medical bill was causally related to his workers compensation claim. Thus, the Board reverses that portion of the ALJ's Order that directed respondent to pay the \$5,438.80 medical bill as well as the penalty associated with that bill. After scouring the record, the Board is unable to ascertain sufficient evidence to establish that claimant's need for a catheterization was directly attributable to his compensable injury. Claimant had undergone the same procedure before his injury on a number of occasions. And there is no medical testimony that suggests that claimant's need for the procedure on this occasion, *which occurred before the date of the stipulated Order was entered authorizing Dr. Galichia to serve as the treating physician*,<sup>17</sup> was causally related to his accident. Even Dr. Galichia's records show that claimant has had regular office visits to address his health issues that are unrelated to his work injury.<sup>18</sup> While Dr. Mills testified some time ago that claimant's accident aggravated his peripheral vascular disease and diabetes, that opinion alone does not satisfy claimant's evidentiary burden as to all future treatment, particularly when claimant had undergone this procedure on several occasions before his accident.

Similarly, the Board finds claimant has failed to meet his burden of proving an entitlement to the medical mileage. Other than a demand letter which mentions only a monetary figure, there is nothing to substantiate claimant's request for medical mileage. While he is certainly entitled to mileage to his authorized medical appointments, without some indication of how many miles were traveled, the destination and whether the visits were authorized, it is impossible to sustain any award for mileage. Thus, that portion of the ALJ's Award is reversed for lack of evidence.

Finally, as for claimant's requests for attorney's fees, both of claimant's demand letters contained a reference to \$750 in attorney's fees pursuant to K.S.A. 44-536. At the hearing on this matter, claimant's counsel said nothing about this issue. He offered no testimony or documentation as to the amount of time spent pursuing these post-award matters nor did he request the ALJ enter an order granting him fees. All that is clear is that an Order was presented to the ALJ, apparently by claimant's counsel, which contained a

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<sup>16</sup> *Johnson v. Brook Plumbing*, 281 Kan. 1212, 135 P.3d 1203 (2006).

<sup>17</sup> Arguably, this Order is not effective as it does not contain any date.

<sup>18</sup> P.H. Trans. (Dec. 5, 2006), Resp. Ex. 1.

request for two separate attorney's fees, each in the amount of \$750 with no evidence or affidavit substantiating the request.

In the absence of evidence, the Board cannot allow this award for attorneys fees. Independent of the unorthodox and worrisome method by which this Order came to be signed (albeit undated) there is no touchstone upon which the Board can determine whether the two separate awards for \$750 in attorneys fees is reasonable. A finding of reasonableness is required under K.S.A. 44-536g. In order to make that determination, *at a minimum*, an itemization of the attorney's time involved in the endeavor is necessary. This record is devoid of such evidence. Accordingly, the Board reverses both awards for attorneys fees.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 30, 2007, is reversed and set aside.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

### **CONCURRING AND DISSENTING OPINION**

The undersigned Board Member concurs in the result reached above but for a different legal reasoning. K.A.R. 51-18-2(a) states that "[t]he effective date of the administrative law judge's acts, findings, awards, decisions, rulings or modifications, for review purposes, shall be the day following the date noted thereon by the administrative law judge."

With all due respect to the Division's records and the indication that the Order was signed January 30, 2007, the regulations require a date. The Order at issue here contains no date. I believe this Order is null and void for that reason. And I would reverse the ALJ's Order and set it aside.

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BOARD MEMBER

**DISSENTING OPINION**

The undersigned Board Member respectfully dissents from the majority's decision and would find that respondent's Application for Review was not timely filed. Respondent's counsel knew, as of February 5, when the Order was stamped "received" by his office staff, that the 10 day period in which to appeal was running. When respondent's counsel received the undated Order, he contacted the ALJ's office and was informed that the Order was signed January 30, 2007. Thus, any procedural concerns were alleviated by this information.

The Division's docket record shows that Order was signed by the ALJ and filed on January 30, 2007. Under the applicable statutes and case law, the 10 day period begins to accrue the day after the effective date of the order being appealed and excludes intervening Saturdays, Sundays and holidays.<sup>19</sup> In this instance, the Order was signed and filed on January 30, 2007. The 10th working (non holiday) day following January 31st is February 14, 2007. Respondent's Application for Review was filed, via fax, on February 15, 2007. For this reason, this Board Member would dismiss respondent's appeal for lack of jurisdiction.

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BOARD MEMBER

c: Scott J. Mann, Attorney for the Claimant  
John R. Emerson, Attorney for the Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge

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<sup>19</sup> K.S.A. 44-551; K.A.R. 51-18-2; *Nguyen v. IBP*, 266 Kan. 580, 972 P.2d 747 (1999); *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).